No. 16-1498

In The
Supreme Court of the United States

WASHINGTON STATE
DEPARTMENT OF LICENSING,

Petitioner,

v.

COUGAR DEN, INC.,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Washington

BRIEF OF *AMICI CURIAE* STATES OF IDAHO, CALIFORNIA, KANSAS, LOUISIANA, MASSACHUSETTS, NEW YORK, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, WISCONSIN, WYOMING, AND THE CITY OF NEW YORK IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* STATES

"Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." *In re State Tax on ForeignHeld Bonds*, 82 U.S. (15 Wall.) 300, 319 (1872). A State's authority to impose taxes "extends over all persons and property within the sphere of its territorial jurisdiction." *City of St. Louis v. The Ferry Co.*, 78 U.S. (11 Wall.) 423, 429 (1870). This Court has made clear that such "principles . . . are fundamental and vital in the relations which, under the Constitution, exist between the United States and the several States [and] [u]pon their strict observance depends, in no small degree, the harmonious and successful working of our complex system of government, Federal and State." *Kirtland v. Hotchkiss*, 100 U.S. 491, 498 (1879).

Applying these fundamental principles, this Court has repeatedly held that a "bright-line" standard allowing off-reservation taxation of tribal members "responds to the need for substantial certainty as to the permissible scope of state taxation authority." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 460 (1995) (quoting States' *amicus* brief). The need for bright-line standards is also well-served by this Court's categorical determination that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State," a principle that this

Court has stated "is as relevant to a State's tax laws as it is to state criminal laws." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973).

Here, Article III of the Treaty with the Yakama Nation of 1855 secures to tribal members the right of "free access" from their reservation to "the nearest public highway," and "the right, in common with the citizens of the United States, to travel upon all public highways." Treaty with the Yakama Nation of Indians, June 9, 1855, art. III, 12 Stat. 951, 952–53. That language says nothing about tax immunity while traveling, much less tax immunity for future trade and commerce in goods transported by Yakama tribal members over the nation's highways.

The Washington Supreme Court, interpreting the above treaty provisions, nullified this Court's requirement that exceptions to state taxation be "express" by broadly construing the Yakamas' purported understanding of the treaty so that "any trade, traveling, and importation that requires the use of public roads fall[s] within the scope of the right to travel provision of the treaty." *Cougar Den, Inc. v. Wash. State Dep't of Licensing*, 392 P.3d 1014, 1020 (Wash. 2017). The court's unwarranted expansion of the treaty's plain terms upsets the "harmonious balance" between state and federal laws that is "fundamental and vital" to our constitutional system. *Kirtland*, 100 U.S. at 498.

While the relevant right to "travel" language appears in only three treaties,[1] companies owned by Yakama tribal members are claiming that the travel right exempts them from all manner of state taxation—not only in Washington, but as far away as New York and California. *See* Section III, *infra*. Such an exemption, if recognized, could impair state efforts to collect lawful taxes by shifting the incidence of such taxes off-reservation, such as Washington's choice to tax fuel off-reservation when removed from fuel terminals or when it enters the State, or other States' choices to tax distributors or suppliers of goods off-reservation.[2]

The *amici curiae* States may face significant tax avoidance if Yakama-owned companies act as distributors or suppliers of goods to tribal retailers on other reservations in a State that has shifted the incidence of its taxes off-reservation to, for example, first possession of goods within a State. Such goods would go untaxed if, as the Washington court concluded, the right

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[1] Treaty with the Yakamas, June 2, 1855, art. III, 12 Stat. 951, 952–53 (1859); Treaty with the Nez Perces, June 11, 1855, art. III, 12 Stat. 957, 958 (1859); Treaty with the Flatheads (Treaty of Hell Gate), July 16, 1855, art. III, 12 Stat. 975, 976 (1859).

[2] *See, e.g.*, Idaho Code § 63-2508 (cigarette stamps to be "affixed by person first receiving cigarettes in state"); Idaho Code § 63-2402 (fuel tax "due and payable upon receipt of the motor fuel in this state by the distributor"); Cal. Rev. & Tax. Code § 30123(b) ("[t]here shall be imposed upon every distributor a tax upon the distribution of tobacco products"); Wash. Rev. Code § 82.38.030 (fuel tax levied and imposed when fuel enters state or is removed from rack at refinery or terminal); New York Tax Law § 471(2) (requiring tax-stamp agents to pay taxes on cigarettes in the first instance).

to travel prohibits taxation of goods merely because those goods are being transported by Yakama tribal members. As the Petitioner shows, such a result cannot be reconciled with the treaty language here. But the *amici* States are also concerned that the Yakama arguments undermine this Court's holdings that shifts in a tax's legal incidence to off-reservation locations are not only permissible, but necessary for effective administration of state tax laws. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 460.

The *amici curiae* States have a strong interest in affirmation of this Court's oft-repeated acknowledgment of the need for "bright-line" standards with regard to taxation of tribal members once outside the bounds of a federally-recognized Indian reservation. Those bright-line standards are undermined if exceptions are crafted through interpretation of treaty terms to create tax-exempt, off-reservation rights not plainly expressed on the face of the treaty.

SUMMARY OF THE ARGUMENT

It is generally the case that within Indian reservations and other lands set aside in trust for their occupancy, tribes and tribal members possess immunity from generally applicable state revenue laws, including state taxes, absent congressional consent. *Mescalero Apache Tribe*, 411 U.S. at 148.

But when tribal members go off-reservation, the general rule of immunity from state taxation flips, and

both tribal members and goods in their possession are subject to nondiscriminatory, generally applicable state laws absent "express federal law to the contrary." *Id.* at 148–49. Together, these rules mean that in Indian taxation cases a frequently dispositive issue is whether the legal incidence of the tax attaches to a tribal member on- or off-reservation. If the latter, then state tax law will apply unless there is a federal law that speaks with sufficient clarity to qualify as an "express" prohibition of state taxation authority.

In the present dispute, the parties agree that the legal incidence of Washington's motor fuels tax is imposed outside the Yakama Reservation when fuel is removed from the bulk system from sources in Washington, or when fuel enters the State, irrespective of whether such fuel is transported over the public highways. Cougar Den, Inc., owned by a tribal member, nonetheless asserts immunity from taxation based on a treaty provision guaranteeing Yakama tribal members "the right, in common with citizens of the United States, to travel upon all public highways." Treaty with the Yakama Nation, art. III, 12 Stat. at 952–53. The Washington Supreme Court agreed, and in so doing essentially crafted an immunity from taxation for any activity constituting "trade," despite the lack of any reference to "trade" in the plain language of the treaty. The court's holding contradicts this Court's case law requiring an express federal statute to abrogate a State's tax authority. The Washington court then compounded its error by disregarding a prior federal court decision that concluded that the 1855 treaty does not

expressly confer a right to engage in trade that would preempt state taxation or regulation of goods in the possession of Yakama tribal members outside Indian country. *See King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 998 (9th Cir. 2014) (finding no separate "right to trade in the Yakama Treaty").

The reasoning of the decision below may encourage members of the Yakama Nation and other tribes with similar treaty language to adopt business models that allow them to "market" their exemption from taxation in order to deliver goods to tribal retailers nationwide, free of the prepayment of state taxes that would otherwise apply. The decision below is but one example: California and New York have both been embroiled in disputes with Yakama tribal members asserting that the treaty right to travel immunizes them from payment of taxes on cigarettes or fuel bound for Indian reservations in those States.

This Court should reaffirm that treaty terms defining off-reservation rights, such as the Yakama Treaty's plain statement of the right to travel upon public highways, should not be expanded beyond their natural meaning to the derogation of the States' jurisdiction over tribal members' commercial activities outside the sphere of Indian country. Off-reservation treaty rights can coexist with state sovereign jurisdiction "when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making," *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999), but respect for state sovereignty demands that preemption of state taxation

powers be expressed on the face of the treaty, not crafted through reconstruction of tribal understanding.

ARGUMENT

I. ONLY "EXPRESS" FEDERAL LAWS ARE SUFFICIENT TO EXEMPT TRIBES OR THEIR MEMBERS FROM APPLICATION OF NONDISCRIMINATORY STATE TAX LAWS WHEN OFF-RESERVATION.

This Court has established a firm dichotomy for addressing state authority to tax the activities of tribal members on and off federally-established reservations. While in some circumstances determining the bounds of state jurisdiction over tribal members requires a balancing of federal, state, and tribal interests, *see, e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980), "[i]n the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). On-reservation, "'[a]bsent cession of jurisdiction or other federal statutes permitting it,' [the Court has] held, a State is without power to tax reservation lands and reservation Indians." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992) (quoting *Mescalero Apache Tribe*, 411 U.S. at 148). Off-reservation, the mirror-image rule applies: tribal members are generally subject to state regulation and taxation, unless state police powers are

preempted by an "express federal law to the contrary." *Mescalero Apache Tribe*, 411 U.S. at 148–49.

These "bright-line standards" are intended to provide the certainty necessary for efficient administration of state tax laws. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. at 460. This Court's cases make clear that the Washington Supreme Court's expansive interpretation of the 1855 treaty is at odds with the principle that states are free to impose generally applicable taxes on off-reservation tribal activity absent an "express" federal law to the contrary.

For example, *Mescalero Apache Tribe* involved a challenge to application of New Mexico's gross receipts and use taxes to an off-reservation, tribally-owned ski resort located on federal land. 411 U.S. at 146. With regard to the State's tax on ski lifts permanently affixed to the tribally leased land, the Court found the requisite express federal prohibition in Section 5 of the Indian Reorganization Act of 1934 ("IRA"), then codified as 25 U.S.C. § 465.[3] Section 5 exempts from state and local taxation "any lands or rights acquired" under the IRA by the United States on behalf of a tribe or Indian. The Court reasoned that the "use of permanent improvements upon land is so intimately connected with use of the land itself that an explicit provision relieving the latter of state tax burdens must be construed to encompass an exemption for the former." 411 U.S. at 158.

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[3] Section 5 of the IRA is now codified, in relevant part, at 25 U.S.C. § 5108.

The Court declined, however, to extend Section 5's taxation exemption to income derived from operation of the ski resort, *id.*, even though the income was generated from, and dependent upon, the tax-exempt, off-reservation property—indeed, the very purpose for tribal possession of the property was to generate such income.

The lesson of *Mescalero Apache Tribe* is that an off-reservation commercial activity is not tax-exempt merely because the "land from which it is derived, or its other source, is itself exempt from tax." *Id.* at 156. The Washington Supreme Court failed to apply this principle when it concluded that trade requires travel, and thus shares in any tax or fee exemption that applies to such travel. As demonstrated by *Mescalero Apache Tribe*, however, income-generating activities that employ tax-exempt property are not themselves tax-exempt. By the same token, trade in goods that employs a treaty-protected right to transport the goods should not be exempted from state taxation or other regulation.

Likewise instructive is *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), where this Court, citing its "categorical approach" to taxation issues, *id.* at 458, rejected a tribe's assertion that a treaty provision should be liberally interpreted to bar the State from taxing income of tribal members employed by the tribe but domiciled off-reservation. The tribe relied upon a provision that secured to the tribe "'the jurisdiction and government of all the persons and property that may be within their limits west, so that

no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants . . . but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all [such] laws. . . .'" *Id.* at 465 (quoting Treaty of Dancing Rabbit Creek, Sept. 27, 1830, Art. IV, 7 Stat. 333–334). The Court made short work of the argument by focusing on the treaty's unambiguous text:

> By its terms, the Treaty applies only to persons and property "within [the Nation's] limits." We comprehend this Treaty language to provide for the Tribe's sovereignty within Indian country. We do not read the Treaty as conferring super-sovereign authority to interfere with another jurisdiction's sovereign right to tax income, from all sources, of those who choose to live within that jurisdiction's limits.

Id. at 466 (bracketed material in original).

Just like *Mescalero Apache Tribe, Oklahoma Tax Commission v. Chickasaw Nation* demonstrates that when the incidence of the tax falls on a tribal member outside the geographical limits of a reservation, a court cannot create an exception to such tax based on inference. Only an express exemption is sufficient to preempt taxation. "This Court has repeatedly said that tax exemptions are not granted by implication." *Mescalero Apache Tribe*, 411 U.S. at 156 (quoting *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943)). *Oklahoma Tax Commission v. United States* addressed the application of state estate taxes

to cash and securities held by the United States for a tribal member, and subject to restrictions on alienation. 319 U.S. at 600. The Court held that Congress, by restricting alienation of the cash and securities, "cannot be supposed by implication to have prohibited estate taxes," because if Congress intends to preempt the state from levying "a general non-discriminatory estate tax applying alike to all its citizens," Congress "should say so in plain words." 319 U.S. at 606–07. Such reasoning applies, with even greater force, to taxes whose incidence falls on tribal members or entities for activities outside the reservation.

Other than the use tax in *Mescalero Apache Tribe*, the *amici* States know of no case where this Court has held preempted a state tax imposed on a tribe or tribal member where the legal incidence attached to activities occurring off-reservation. It is beyond cavil that this Court's requirement that tax exemptions be "express"—or its alternative formulation of "unmistakably clear" (*Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985))—demands, if not explicit language preempting otherwise extant off-reservation taxing authority, a treaty or statutory provision whose application necessarily precludes the States' exaction of fees as a prerequisite to the enjoyment of the off-reservation right explicitly reserved by the tribe. *See, e.g.*, *Tulee v. State of Washington*, 315 U.S. 681, 685 (1942) (State could not impose license fee on Indians exercising right to fish at usual and accustomed fishing places because such fee was effectively "a charge

for exercising the *very right* their ancestors intended to reserve") (emphasis added).

Time after time, this Court, in a wide variety of contexts, has not only adhered to *Mescalero Apache Tribe's* categorical holding that Indians going beyond reservation boundaries are "subject to any generally applicable state law," but has emphasized the breadth of state authority over off-reservation Indians.[4] The Washington court failed to apply such precedents employing the clear rule laid down in *Mescalero Apache Tribe*. Indeed, other than a fleeting reference to *Mescalero Apache Tribe* at the beginning of its legal analysis, *Cougar Den, Inc.*, 392 P.3d at 1016, the majority opinion disregarded the necessity of an "express" exemption from state law—a necessity demanded by respect for state sovereign authority over tribal members outside Indian reservations. The Washington

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[4] *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034–35 (2014) (emphasizing the various ways in which Michigan could apply its civil and criminal laws to an off-reservation casino); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005) (citing *Mescalero Apache Tribe* and rejecting the Tribe's assertion that the courts should apply an interest-balancing test to a state motor fuel tax whose incidence fell on an off-reservation distributor because the asserted immunity was inconsistent with "our efforts to establish 'bright-line standard[s]' in the context of tax administration") (quoting *Arizona Dep't of Revenue v. Blaze Const. Co.*, 526 U.S. 32, 37 (1999)); *cf. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (distinguishing *Mescalero Apache Tribe* based on the status of trust land as Indian country with respect to imposition and collection of cigarette tax on sales to tribal members).

Supreme Court's decision is thus at odds with this Court's precedents and must be reversed.

II. THE WASHINGTON SUPREME COURT'S INTERPRETATION OF THE YAKAMA TREATY'S RIGHT-TO-TRAVEL PROVISION EXTENDS THE CANONS OF CONSTRUCTION FAVORING INDIAN TRIBES FAR BEYOND THEIR INTENDED APPLICATION.

While the Washington court cited *Mescalero Apache Tribe*, it failed to apply its rule that federal exemptions from state taxation for tribal members outside their reservation must be "express." 392 P.3d at 1016. Instead, it purported to employ canons of construction requiring the terms of a treaty to be "'carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the [treaty] council.'" *Id.* (quoting *Tulee*, 315 U.S. at 684). Over the State's objection that the plain language of the right to travel did not bar state taxation of goods simply because they are "incidentally brought over a highway," *id.*, the court determined that the Yakama Nation negotiators would have intended to reserve both "the right to use future roads and to trade their goods." *Id.* at 1017. The court's finding of a right to trade, which does not appear on the face of the treaty, not only ignored this Court's requirement that off-reservation exemptions from state jurisdiction be "express," it also misapplied traditional canons of construction applicable to treaties with Indian Nations.

The canons date back at least to Justice McLean's concurring opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), where he stated that "[t]he language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." *Id.* at 582 (McLean, J., concurring).

While the canons provide for a "more extended meaning" of treaty terms, they cannot be used to *add* terms to a treaty. Addressing Justice McLean's comments in *Worcester*, this Court has cautioned that "the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty. . . . We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices." *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945). Accordingly, "Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). "[C]ourts cannot ignore plain language that, viewed in historical context and given a 'fair appraisal,' . . . clearly runs counter to a tribe's later claims." *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985) (quoting *Washington v. Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 675 (1979)). In the end, the canons of construction are

fulfilled if the Court is satisfied "that the Government has performed all that it promised." *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 180 (1947).

In light of this Court's rule that treaty language is to be construed in accordance with the tenor of the treaty, the right-to-travel provision in the first paragraph of Article III of the Yakama treaty must be read in the context of its accompanying provisions. In the preceding portion of the first paragraph of Article III, the treaty parties unambiguously limited the exchange of promises to road- or highway-related matters. The Yakamas accepted the Government's right to establish roads "for the public convenience" through the reservation—to which the Yakamas otherwise had exclusive occupancy rights under Article II[6]—but reserved (1) "the right of way, with free access from the [reservation] to the nearest public highway," and (2) "the right, in common with citizens of the United States, to travel upon all public highways." 12 Stat. at

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[6] In relevant part, Article II provides with respect to the land set apart for tribal occupancy:

> All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent.

12 Stat. at 952.

952–53. In short, the topics in the first paragraph are limited to the use of roads and highways. *Id.* at 953.

The second paragraph then identifies specific rights that the Yakamas may exercise during their travels outside the reservation—i.e., the exclusive right of taking fish from streams on or bordering the reservation; the right of taking fish "at all usual and accustomed places, in common with the citizens of the Territory"; the right to erect temporary buildings for fish curing purposes; and hunting, gathering and pasturing rights "upon open and unclaimed lands." *Id.* at 953.[6] There is no ambiguity with respect to the activities for which the Yakamas reserved off-reservation rights under Article III. When all provisions in Article III are read together, the obvious conclusion, drawn from the plain language, is that the Nation reserved the right to travel to and from the reservation and the right to exercise certain enumerated rights at locations reached by means of such travels. Conspicuously absent from the enumerated rights is any expression of intent that off-reservation trade or commerce that uses

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[6] In its entirety, the second paragraph of Article III reads:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

12 Stat. at 953.

highways would be unregulated or untaxed by the governments of the United States.

Such absence is reflected in the decision of the Washington Supreme Court, which did not purport to find a right to trade in the plain treaty language. Rather, the Washington court found such exemption to exist only in the description of treaty negotiations made by the federal district court in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), *aff'd sub nom. Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). There, the district court had found that:

> [F]ar-reaching travel was an intrinsic ingredient in virtually every aspect of Yakama culture. . . . Travel was particularly important for the purpose of trade . . . the Yakamas traded goods, such as dried salmon, at various tribal trade centers throughout the Northwest and beyond. . . . The Yakamas' way of life depended on goods that were not available in the immediate area. . . . Yakamas also traveled for hunting, gathering, fishing, grazing, recreational, political, and kinship purposes.

955 F. Supp. at 1238–39.

The *Cree* findings do nothing more than demonstrate that trade was one among many of the purposes served by the right to travel. The Washington Supreme Court then went on, however, to conflate such *purpose* of the right to travel with the *meaning* of the term "travel." The fact that the Yakamas reserved a right to travel "for the purpose of trade" and other purposes, *id.* at 1238, does not fairly imply that either the Yakamas

or Congress understood the term "travel" to include all activities, such as trade, that tribal members engaged in while traveling. Had the parties so intended, the second paragraph in Article III, which reserves the right to engage in certain location-related subsistence practices, would have been unnecessary. The fact that the parties felt the need to identify those off-reservation activities specifically reserved makes clear that the right to trade was not encompassed in the treaty, and further illustrates that the Washington Supreme Court reached its decision only by essentially rewriting the treaty to supply such right. *See United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900) ("in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words").

The Washington Supreme Court's inferred off-reservation trading right when using highways not only contradicts this Court's bright-line rules for preempting state taxation; it ignores one of the primary purposes that led the United States to negotiate treaties with Indian tribes. *See* Charles Wilkinson, *American Indians, Time, and the Law* 101 (Yale Univ. Press 1987) (In treaty negotiations, "[t]he United States was also a surrogate for future states. It wanted to remove the cloud of Indian sovereign control . . . so that new states could govern most lands within their boundaries free of complications with Indians").

In short, the plain language of Article III, as interpreted using the canons of construction, supports the conclusion that the right to travel does not create a right to trade goods free of state regulation and taxation simply because the goods will, at some point, be transported over public roads. In fact, this exact line has been drawn by the Ninth Circuit Court of Appeals, which has affirmed the right of States to impose fees on off-reservation trade by the Yakamas, whether or not incidentally tied to travel, while striking down state taxes and fees that directly condition the actual transportation of goods. *See King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989 (9th Cir. 2014). There, the Ninth Circuit recognized that Article III does not create an independent right to trade: "[a]s shown by the plain text of Article III, the Treaty reserved to the Yakama the right 'to travel upon all public highways.' Nowhere in Article III is the right to trade discussed." *Id.* at 997. In *King Mountain Tobacco*, a tribal member-owned company shipped unblended tobacco from the reservation to North Carolina for processing and then shipped the blended product back to the Yakama Reservation in its own trucks. *Id.* at 991. The court concluded that the fact that tobacco had to travel over public highways did not exempt the tribal member from paying a state-mandated flat-fee payment into an escrow fund to offset smoking-related health care costs in the event of insolvency by certain cigarette manufacturers, stating flatly that "there is no right to trade in the Yakama Treaty." *Id.* at 998.

In contrast to the decision below, the *King Mountain Tobacco* decision follows this Court's admonition that "[t]he Indian canon of construction 'does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.'" *Id.* at 998 (quoting *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986)). The *amici* States urge this Court to once again affirm that if the application of a generally applicable state law to off-reservation tribal members is to be preempted, Congress must say so in plain and unambiguous terms.

III. EXPANSION OF THE RIGHT-TO-TRAVEL PROVISION TO PROHIBIT TAXES ON YAKAMA-TRANSPORTED GOODS THREATENS THE BRIGHT-LINE STANDARDS ESSENTIAL TO ADMINISTRATION OF STATE TAX LAWS.

Despite this Court's clear precedents, the Washington court relied upon strained inferences from historical context, recited in a different case, to create *sub silentio* an entirely new off-reservation right to trade, immune from non-discriminatory state regulation. If allowed to stand, the Washington court's decision could have far-reaching consequences for the tax collection efforts of all States that import goods from businesses associated with the Yakama and the two other tribes that have treaties with identical right-to-travel language. In essence, all the nation's highways would become tax immunity zones for Yakama-owned businesses.

For example, in 2008, California's tax agency determined that First American Petroleum, a Yakama member-owned fuel importer, owed taxes on motor vehicle and diesel fuel imported from Nevada to its tribal customers in California. *See* Petition for Review, *First American Petroleum, LLC v. Superior Ct., et al.*, Case No. S248433, at 15 (Cal. S. Ct. Apr. 23, 2018) (hereinafter First American Petition for Review).[7] Under California's motor vehicle and diesel fuel tax laws, which are similar to Washington's, the incidence of tax is imposed on the importer or owner of the fuel outside the Yakama reservation when fuel is removed from the bulk system from sources in California, or when fuel enters California. Cal. Rev. & Tax. Code §§ 7301 *et seq.* & 60001 *et seq.* First American Petroleum continues to challenge California's imposition of this tax on the ground it violates First American Petroleum's right to

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[7] In relevant part, the Petition filed by First American Petroleum, LLC, which is not available online, asserts as follows:

> The [Board of Equalization] imposed fuel taxes on First American for transporting fuel from Nevada to its tribal customers in California. . . . This fuel tax violates First American's rights guaranteed by the United States in its Treaty of 1855 with the Yakama Nation. I PE 5:163-70; *Salton Sea Venture, Inc. v. Ramsey* (S.D. Cal. Oct. 18, 2011) No. 11-cv-1968-IEG (WMC), 2011 U.S. Dist. LEXIS 120145, at *20; *Cougar Den, Inc. v. Dep't of Licensing* (Wash. 2017) 392 P.3d 1014, 1020.

First American Petition for Review at 15. The cited litigation and appeal concern First American Petroleum's request for records after California's tax agency issued determinations that First American Petroleum owed taxes. The litigation was brought under California's Public Record Act; it is not a tax refund action. First American Petition for Review at 14.

transport fuel under the Yakama Treaty. *See* First American Petition for Review at 15.

First American Petroleum also relies on an unfair business competition case out of the Southern District of California. In *Salton Sea Venture*, brought by a private fuel retailer against First American Petroleum and its owner, Robert Ramsey, First American Petroleum succeeded in convincing the court that the Yakama Treaty allowed it to import fuel into California without complying with the motor vehicle and diesel fuel tax laws. This allowed the tribal retailer who received the fuel to sell it to nonmembers at a gas station within a California Indian reservation at a lower price than off-reservation private competitors. *Salton Sea Venture, Inc. v. Ramsey*, No. 11-cv-1968, 2011 WL 4945072 at *8 (S.D. Cal., Oct. 18, 2011). In so ruling, the court rejected a tax opinion issued by California's tax agency concluding, correctly in the *amicis'* view, that the right to travel did not apply when the incidence of taxation fell upon the goods themselves, and not upon the transportation of the goods. *Id.* at *7 (discussing agency's March 9, 2011 tax opinion).

Ten years after California first sought to impose its fuel tax, First American Petroleum has not paid the tax and, based on the Yakama Treaty, *Salton Sea*, and now *Cougar Den*, continues to challenge its tax liability in an ongoing dispute with California. *See, e.g.*, First American Petition for Review at 15.

Many other States have similar fuel-tax regimes that could be affected by the Washington Supreme Court's decision.[8]

The States' ability to collect cigarette taxes may also be imperiled if this Court allows the Washington Supreme Court's decision to stand. All 50 States and the District of Columbia impose excise taxes on cigarettes.[9] In New York, as in many other States, such taxes are a crucial part of the State's response to the public health costs associated with tobacco use, which kills over 26,000 people per year in New York alone.[10]

In New York, all cigarettes delivered into the State for resale must be sent initially to state-licensed stamping agents, who buy and affix tax stamps, incorporate their value into the sale price, and pass the cost along down the chain to the consumer, who bears the ultimate liability for the tax.[11] *See* New York Tax Law

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[8] *See, e.g.*, Fed'n of Tax Admins., *State Motor Fuel Tax Points of Taxation* (Jan. 27, 2012), https://old.taxadmin.org/fta/rate/tax_stru.html (last visited Aug. 2, 2018).

[9] *See* Centers for Disease Control and Prevention, Map of Excise Tax Rates on Cigarettes as of June 30, 2018, https://www.cdc.gov/statesystem/excisetax.html (last visited Aug. 2, 2018).

[10] N.Y.S. Dep't of Health, Bureau of Tobacco Control, *Tobacco is the Leading Cause of Preventable Death*, StatShot Vol. 8, No. 3 (Apr. 2015), https://www.health.ny.gov/prevention/tobacco_control/reports/statshots/volume8/n3_tobacco_leading_cause.pdf (last visited Aug. 2, 2018).

[11] The current tax is $4.35 per pack of cigarettes. *See* New York Tax Law § 471(1); N.Y. Comp. Codes R. & Regs. tit. 20, § 74.1(a)(2).

§ 471(2); N.Y. Comp. Codes R. & Regs. tit. 20, §§ 74.2-74.3.

In litigation against New York State and the City of New York, another Yakama-based business has invoked the reasoning employed by the Washington Supreme Court as a basis for exempting it from the State's cigarette-tax regime, including the requirement that all cigarettes be delivered to stamping agents.[12] If this Court were to accept that reasoning, then Yakama- and other, similarly situated tribal cigarette sellers would be able to ship significant quantities of untaxed cigarettes into New York and other States. Such an influx of untaxed cigarettes would increase cigarette use by eliminating the deterrent effect caused by taxes.[13] It would also reduce the excise tax revenue New York collects—revenue on which it depends to recoup some of the extraordinary health care costs associated with tobacco use.[14]

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[12] *See, e.g.*, Opening Br. and Special Appendix of Defendant-Appellant-Cross-Appellee 53, *State of New York v. Mountain Tobacco Co.*, Nos. 17-3198, 17-3222 (2d Cir. Feb. 20, 2018); Letter at 2, *City of New York v. King Mountain Tobacco Co., Inc.*, No. 10-cv-05783 (E.D.N.Y. Nov. 3, 2011).

[13] *See* U.S. Office of Surgeon General, *The Health Consequences of Smoking – 50 Years of Progress* 788 (2014), http://www.surgeongeneral.gov/library/reports/50-years-of-progress; RTI Int'l, *2014 Independent Evaluation Report of the New York Tobacco Control Program* ("RTI Report") 22 (2014), https://www.health.ny.gov/prevention/tobacco_control/docs/2014_independent_evaluation_report.pdf.

[14] Annual healthcare costs associated with tobacco use in New York alone exceed $10 billion, a third of which is paid by Medicaid. *See* N.Y.S. Dep't of Health, Cigarette Smoking and

New York could also lose additional revenue because an influx of untaxed cigarettes could reduce the payments New York receives from cigarette manufacturers participating in the Master Settlement Agreement (MSA). Under the MSA, participating cigarette manufacturers—none of which are currently tribal manufacturers—are required to make annual payments to New York (and other States) to help defray the public health costs of tobacco use.[15] Under a 2015 settlement agreement with New York, participating manufacturers receive a credit against their annual payment obligations based on the volume of untaxed tribal cigarettes sold in New York that the State has sovereign authority to tax.[16] Thus, allowing Yakama and other tribal businesses to sell more untaxed cigarettes in New York will directly diminish the State's MSA payments.

The above-described situations are but examples of the harms that the decision below threatens to cause *amici* States, and underscore the need for this Court to correct the Washington Supreme Court's deviation

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Other Tobacco Use, https://www.health.ny.gov/ prevention/tobacco_ control (last visited Aug. 2, 2018); RTI Report, *supra*, at 25.

[15] Master Settlement Agreement, § IX(c), https://oag.ca.gov/ tobacco/msa (last visited Aug. 3, 2018).

[16] *See* Settlement Agreement § III.C.2(a), https://ag.ny.gov/ NPM-Settlement (last visited Aug. 3, 2018) ("For 2015 and each year thereafter, the [participating cigarette manufacturers] shall receive a credit for each Tribal [ ] Pack on which New York did not collect New York Excise Tax that was sold during that year to New York consumers").

from this Court's case law, and to limit Article III to its plain terms.

CONCLUSION

The decision of the Washington Supreme Court should be reversed.

Respectfully submitted,

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